

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SPIEGEL DEVELOPMENT, INC.,

Plaintiff and Appellant,

v.

JOSE DANIEL MARTINEZ,

Defendant and Respondent.

B206249

(Super. Ct. No. PC035179)

APPEAL from an order of the Superior Court of Los Angeles County.

John P. Farrell, Judge. Affirmed.

Lang, Hanigan & Carvalho, Arthur Carvalho, Jr., and Kent F. Lowry, Jr., for
Plaintiff and Appellant.

Howrey and David G. Meyer for Defendant and Respondent.

Plaintiff Spiegel Development, Inc. appeals from a post-judgment order denying its motion for contractual attorney fees. We affirm.

FACTS AND PROCEEDINGS BELOW

Spiegel contracted with defendant Jose Martinez to purchase two lots in Sylmar. When Martinez breached the contract, Spiegel commenced this lawsuit against Martinez and recorded a lis pendens against the property. The trial court awarded Spiegel \$30,000 in damages plus costs and prejudgment interest.

Spiegel moved for attorney fees under a provision in the contract which provides that the prevailing party in any action arising out of the contract shall be entitled to reasonable attorney fees except that attorney fees shall not be awarded if the prevailing party “commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made.” (We discuss this provision more fully below.)

In support of Spiegel’s motion, its attorney filed a declaration stating that the month after filing the suit he telephoned the attorney representing Martinez in a separate lawsuit brought by a buyer of one of the same lots. Spiegel’s attorney told Martinez’s attorney that Spiegel was willing to mediate its claim either with or separate from the other action. Martinez’s attorney stated that he was not sure he would represent Martinez in Spiegel’s action but asked Spiegel’s attorney to send him a copy of the summons and complaint. Spiegel’s attorney closed the conversation by suggesting that Martinez complete the mediation with the other buyer and once he had the right to sell the property to Spiegel he and Spiegel could mediate their dispute.

Approximately 10 days after this discussion, Martinez personally telephoned Spiegel’s attorney. The parties dispute what was said in that conversation but the trial court accepted Spiegel’s version. Spiegel’s attorney testified Martinez told him that he was not being represented by the attorney who was representing him in the other lawsuit and that at the moment he had no attorney representing him in the Spiegel action. Spiegel’s attorney told Martinez that “Spiegel was willing to participate in a mediation of

all parties, including the other buyer.” Martinez responded that “he was not prepared to mediate with Spiegel without first hiring counsel.”

It is undisputed that no mediation occurred between Spiegel and Martinez before or after Spiegel filed its lawsuit against Martinez.

The trial court denied Spiegel’s motion for attorney fees. It found that neither Spiegel’s conversation with the attorney representing Martinez in another matter nor Spiegel’s subsequent conversation with Martinez constituted an attempt at mediation.

Spiegel filed a timely appeal.

DISCUSSION

I. THE ATTORNEY FEES PROVISIONS OF THE CONTRACT

Paragraph 27 of the contract states: “In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 22A.” Paragraph 22A, “Mediation,” states in relevant part: “Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.” Finally, Paragraph 22B(2) states: “The filing of a court action to enable the recording of a notice of pending action . . . shall not constitute a waiver of the mediation . . . provisions.”¹

¹ The court ruled that notwithstanding paragraph 22A the contract did not require Spiegel to attempt to mediate its dispute with Martinez before filing its lawsuit. Rather, the court interpreted paragraph 22B(2) to mean that filing an action in order to enable the recording of a lis pendens does not violate the mediation-first requirement under paragraph 22A. The parties did not address this issue below and we need not address it on appeal because there are other grounds sufficient to support the court’s judgment.

II. REVIEW DE NOVO

This appeal turns on questions of law. Did Spiegel's conversation with the attorney who was representing Martinez in a separate dispute with another party constitute a legally sufficient attempt by Spiegel to resolve its dispute with Martinez? If not, did Spiegel's subsequent conversation with Martinez constitute a legally sufficient attempt at mediation? We independently review the trial court's resolution of these questions. (*Gil v. Mansano* (2004) 121 Cal.App.4th 739, 743.)

III. THE CONVERSATION BETWEEN SPIEGEL'S ATTORNEY AND THE ATTORNEY REPRESENTING MARTINEZ IN ANOTHER MATTER

Shortly after filing the complaint against Martinez, Spiegel's attorney had a telephone conversation with the attorney representing Martinez in a separate lawsuit brought by a different party involving one of the same lots. In that conversation Spiegel's attorney told Martinez's attorney that "Spiegel was willing to mediate [its] claim, either with or separate from the other buyer's action." Spiegel's attorney made this statement knowing that the other attorney was not representing Martinez in his dispute with Spiegel and that the other attorney "was not certain" that he would represent Martinez in the Spiegel action.

It is undisputed that Martinez's lawyer in the separate action never communicated his conversation with Spiegel's lawyer to Martinez. Spiegel contends, however, that knowledge of its offer must be imputed to Martinez under the "general rule . . . that the knowledge of the agent in the course of [the] agency is the knowledge of the principal" (*In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 439) even if "the knowledge acquired by the agent was not actually communicated to the principal[.]" (*O'Riordan v. Federal Kemper Life Assurance* (2005) 36 Cal.4th 281, 288.) Martinez responds with another general rule that holds "the client 'will ordinarily be charged with constructive notice only where the knowledge of the attorney has been gained in the course of the particular transaction in which he has been employed by that principal.'" (*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1413.)

The circumstances in this case appear to fall under the *Zirbes* rule because Martinez's lawyer did not gain his knowledge of Spiegel's offer to mediate in the course of representing Martinez in his dispute with Spiegel. In any case, the attorney did not pass Spiegel's communication on to Martinez and we cannot say that his duty to do so was so clear that Spiegel's communication must be imputed to Martinez as a matter of law.

IV. THE CONVERSATION BETWEEN SPIEGEL'S ATTORNEY AND MARTINEZ

In a conversation with Martinez, who was representing himself in the Spiegel action, Spiegel's attorney told Martinez that "Spiegel was willing to participate in a mediation of all parties, including the other buyer." The trial court concluded that this statement did not constitute "attempting to resolve the matter through mediation" because the statement was ambiguous. We agree.

The verb "attempt" means to "make an effort" to do something. (Merriam-Webster's Collegiate Dictionary (10th ed. 1995) p. 74.) The adjective "willing" means "inclined or favorably disposed." (*Id.* at p. 1354.) Spiegel's statement that it was "willing to participate in a mediation" could reasonably be interpreted to mean that it would agree to mediation if Martinez wanted it but that the choice was up to Martinez. Spiegel's statement could also reasonably be interpreted to mean that it would only mediate its dispute with Martinez if the buyer involved in the other lawsuit against Martinez joined the mediation. Spiegel's placing such a precondition on its mediation with Martinez would not be a valid attempt to mediate under their contract because their contract does not require either Martinez or Spiegel to mediate a dispute with someone who is not a party to the contract. Furthermore, nothing in the record showed that the third party was willing to negotiate with Spiegel and Martinez.

DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.